

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

ERENE BRIESE, Individually;)
JDB and JRB, Individually;)
Erene Briese as Personal)
Representative on behalf of the)
heirs of David L. Briese, Jr.,)

Plaintiffs,)

vs.)

STATE OF MONTANA, et al.,)

Defendants.)

CV-09-146-BLG-RFC

**ORDER ADOPTING FINDINGS
AND RECOMMENDATIONS OF
U.S. MAGISTRATE JUDGE**

On May 18, 2011, United States Magistrate Judge Carolyn Ostby entered Findings and Recommendation. Magistrate Judge Ostby recommends this Court grant the motion to dismiss.

Upon service of a magistrate judge's findings and recommendation, a party has 14 days to file written objections. 28 U.S.C. § 636(b)(1). In this matter, no party filed objections to the May 18, 2011 Findings and Recommendation. Failure to object to a magistrate judge's findings and recommendation waives all objections to the findings of fact. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir.

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1999). However, failure to object does not relieve this Court of its burden to review de novo the magistrate judge's conclusions of law. *Barilla v. Ervin*, 886 F.2d 1514, 1518 (9th Cir. 1989).

Rule 41(a)(2), Fed. R. Civ. P., provides, in relevant part, that after service of an answer or summary judgment motion, and if no stipulation of dismissal is obtained, "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper."

Whether to grant a motion for voluntary dismissal is within the district court's sound discretion. *Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001) (citation omitted). "A district court should grant a motion for voluntary dismissal under Rule 41(a)(2) unless a defendant can show that it will suffer some plain legal prejudice as a result." *Id.* (citing *Waller v. Financial Corp. of America*, 828 F.2d 579, 583 (9 Cir. 1987) and *Hamilton v. Firestone Tire & Rubber Co.*, 679 F.2d 143, 145-46 (9 Cir. 1982)).

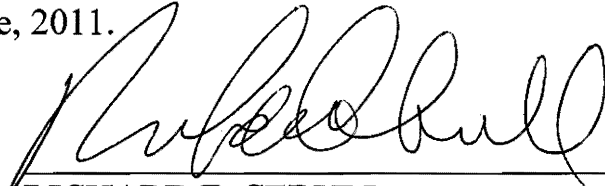
Joanne Brieese and J. Gregory Tomicich have not sufficiently shown that they will suffer some plain legal prejudice if the Court grants the motion to dismiss. There is no reason to keep them in the case.

After an extensive review of the record and applicable law, this Court finds Magistrate Judge Ostby's Findings and Recommendation are well grounded in law and fact and adopts them in their entirety.

Accordingly, **IT IS HEREBY ORDERED** that Plaintiffs' Motion to Dismiss Joanne Briese and J. Gregory Tomicich with prejudice [*Doc. 113*] is **GRANTED**. Plaintiffs' Motion for Protective Order Staying Discovery Pending Decision on Dispositive Motion [*Doc. 115*] is **MOOT**.

The Clerk of Court shall notify the parties of the entry of this Order.

DATED the 15th day of June, 2011.



RICHARD F. CEBULL
UNITED STATES DISTRICT JUDGE